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No. 85-5542

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ALVIN BERNARD FORD, OR CONNIE FORD INDIVIDUALLY, AND AS NEXT FRIEND ON BEHALF OF ALVIN BERNARD FORD, *Petitioner,*

v.

LOUIE L. WAINWRIGHT, Secretary Department of Corrections, *Respondent.*

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY BRIEF FOR PETITIONER

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ARGUMENT

In reply to the Brief of Respondent, Mr. Ford will make three points. First, there was no abuse of the writ, and respondent's implication that there was is inaccurate and without any record support. Second, respondent's portrayal of the Florida governor as a "neutral and detached" factfinder, capable of making a reliable determination of competency to be executed, is flatly contradicted by the practice of the governor in making competency determinations. Third, federal habeas corpus provides an entirely appropriate remedy for Mr. Ford's claim, even though he has not further challenged the propriety of his conviction or sentence.

1. Respondent has not expressly argued, as he did in the lower courts, that Mr. Ford has abused the writ. Nevertheless he has raised the spectre of abuse by asserting that "Ford's pleadings allege his mental deterioration began in December, 1981, yet he never sought treatment, nor did he bring the matter of his alleged insanity to any court until ten days prior to his scheduled 1984 execution." Brief of Respondent, at 75. Respondent's implication is clear: Counsel for Mr. Ford knew about Mr. Ford's incompetency in sufficient time to raise it in his first habeas proceeding but instead "saved" the issue for a successive petition, and in order to make the issue stronger, sought no treatment for Mr. Ford which might have the effect of restoring his competency.

As demonstrated in the Statement of the Case in Mr. Ford's opening brief, respondent's implication is unwarranted and has no support whatsoever in the record.

Mr. Ford's first habeas petition was filed on December 1, 1981.[1] No claim was made concerning competency—to

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[1] The information concerning the dates of Mr. Ford's first habeas proceeding is from the docket sheet for that proceeding, maintained by the United States District Court for the Southern District of Florida as No. 81-6663-Civ-NCR. If needed, counsel will provide a copy of the docket sheet for the Court.

be tried or executed—nor had any such claim been made in any prior proceeding in Mr. Ford's case. JA 142. Moreover, counsel for Mr. Ford during his first habeas proceeding knew of no factual basis for such a claim at that time. *Id.* On December 7, 1981, the district court denied the writ and Mr. Ford filed his notice of appeal.[2] Thus, during the pendency of Mr. Ford's first petition in the district court, there was no reason for Mr. Ford's competency to be raised as a ground for habeas corpus relief. Respondent's implication that the issue could have been raised in that short-lived proceeding is plainly without basis.

During the pendency of Mr. Ford's appeal, gradual changes did begin to appear in his behavior. JA 17-34. In a letter received within the week after the notice of appeal was filed, counsel for Mr. Ford were provided the first hint that Mr. Ford was becoming ill: He wrote that the staff of a local radio station had been talking to him in their broadcasts over the past few weeks. JA 21-23. Mr. Ford's behavior and writing gradually became more peculiar thereafter. JA 23-24. Because of this, counsel asked Dr. Jamal Amin, a psychiatrist who had previously evaluated Mr. Ford in connection with clemency proceedings, to resume seeing Mr. Ford "for therapeutic purposes." JA 60. Dr. Amin saw Mr. Ford for several months thereafter, *id.*, and came to the conclusion that Mr. Ford was suffering from paranoid schizophrenia. JA 88-92. Dr. Amin recommended treatment with psychotropic medication, JA 92, but despite efforts by counsel to obtain such treatment, the prison medical staff refused. JA 147. They "took the position that there was nothing wrong with Mr. Ford." *Id.* Respondent's assertion that treatment was never

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[2] The notice of appeal was filed immediately, because the district court also refused to stay Mr. Ford's execution, requiring immediate application to the court of appeals.

sought for Mr. Ford, is, accordingly, flatly contradicted by the record.

Even though Mr. Ford continued to deteriorate through the remainder of 1982 and through 1983, counsel had no notice that his illness had compromised his ability to understand the nature and effect of his death sentence or why he was to be executed until mid-October, 1983. JA 147-48. During an interview at that time, Mr. Ford manifested the first signs that his psychotic thought processes had begun to affect his competency when he began explaining how "Ford v. State" had overturned his death sentence. JA 148. Within one week of that interview, counsel commenced the § 922.07 proceeding on Mr. Ford's behalf. *Id.* Thus, counsel immediately pursued state remedies upon learning facts suggesting a claim of incompetency. There was no "holding back" of an issue until a death warrant was signed, as implied by respondent.

Mr. Ford's request for a stay of execution and treatment under § 922.07 was not decided by the Florida governor for six months thereafter. During this time, if Mr. Ford had filed proceedings respecting his competency in the state or federal courts, the court of appeals found that "he would most probably have been met with a ruling that [his] sole relief was pursuant to Florida Statute § 922.07." JA 169. Accordingly, Mr. Ford's pursuit of relief under § 922.07 was necessary before he could initiate judicial proceedings.

Mr. Ford's § 922.07 proceeding ended when the governor signed a death warrant on April 30, 1984. JA 12. Three weeks thereafter, Mr. Ford filed proceedings in the state courts, JA 1, and less than a week after that, in the federal courts, JA 1-2.[3]

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[3] Counsel for Mr. Ford was unable to initiate judicial proceedings

Thus, while it is true that Mr. Ford did not initiate any judicial proceedings concerning his competency until ten days before his scheduled execution, the implication by respondent that Mr. Ford, by that "late filing, abused the writ, is wholly unwarranted. As the uncontradicted record demonstrates, counsel for Mr. Ford acted in a timely fashion to raise the competency issue in the only forum that was available as soon as it became apparent. Moreover counsel did nothing to hold back or enhance the issue until it was "ripe." To the contrary counsel sought appropriate treatment for Mr. Ford which, if provided, might have maintained his competency. Respondent's own employees, however, refused to provide that treatment. On this record, there is no abuse of the writ.

2. Respondent has portrayed the Florida governor as a "neutral and detached official" capable of making reliable competency determinations based on the advice of the psychiatrists he appoints to evaluate the condemned. Having bolstered the governor's portrait with the "presumption of honesty and integrity" accorded "policymakers with decisionmaking power," respondent urges the Court to find the executive decision-making process of § 922.07 adequate to protect either the Eighth Amendment right or the state-created right to be spared from execution when incompetent.

With this portrayal, respondent has obscured the fundamental defects in the governor's competency-determination procedure, which—even if the governor acts with the integrity of a neutral and detached official—

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immediately after the signing of the death warrant, because at that time all of counsel's resources were devoted to staying the execution of another client, James Adams. Mr. Adams was executed on May 10, 1984. Mr. Ford's pleadings were prepared and filed by May 21, 1984.

prevent the governor from making sufficiently reliable determinations of competency to satisfy the Eighth or Fourteenth Amendment.

To resolve any residual doubt about this, the Court should look once again at the decision-making process followed by the governor under § 922.07. The governor appoints three psychiatrists to examine the condemned and report their findings to him. The condemned is allowed to have counsel present during the psychiatric examination, but the governor by executive order prohibits counsel from participating in the examination "in an adversarial manner." *See* Brief for Petitioner, at 30 n. 29. After the examination is over, there is no further role allowed for the advocate for the condemned.

To be sure, counsel for Mr. Ford tried to play a role thereafter: Counsel mailed to the governor a written response to the appointed psychiatrists' reports, and provided as well the reports of Dr. Kaufman and Dr. Amin along with an explanation as to why their opinions were more reliable. JA 149.[4] However, the office of the governor consistently informed Mr. Ford's counsel that they were "not sure" the governor would consider any of the information or argument that counsel submitted. *Id.* Counsel never had the opportunity to address the governor concerning these matters, to question the appointed experts before the governor, or to present to the governor the testimony of Dr. Kaufman, Dr. Amin, Dr. Halleck, and Dr. Barnard (*see* Brief for Petitioner, at 3-6). In short, counsel for Mr. Ford had no assurance that any of the competing expert views about Mr. Ford's illness and its effect on his

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[4] It was in this written response that counsel for Mr. Ford believed they had rebutted the conclusions of the appointed psychiatrists. *See* reference to this in Brief of Respondent, at 46.

competency were even known, much less considered, by the governor.[5]

The Court has *never* approved a rights-determining process of this sort—in any context in which any kind of right is determined—as consistent with due process. At a minimum the Court has required that *both sides* to the controversy be heard by the factfinder. *See, e.g., Goss* v. *Lopez*, 419 U.S. 565, 579-81 (1975) (citing cases); *Grannis* v. *Ordean*, 234 U.S. 385, 394 (1914) ("[t]he fundamental requisite of due process of law is the opportunity to be heard"); *Baldwin* v. *Hale*, 68 U.S. (1 Wall.) 531, 534 (1864) ("[p]arties whose rights are to be affected are entitled to be heard . . ."). The Florida governor, however, determines the life-and-death issue of competency *without* hearing from the condemned. In the case in which there is no material dispute among the experts, such a procedure may be satisfactory.[6] But in the case in which there is a material dispute among the experts, such a procedure

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[5] Mr. Ford was able to present the views of Dr. Kaufman and Dr. Amin to two of the three appointed psychiatrists (the third, Dr. Ivory, refused to consider them). These psychiatrists *adopted* Dr. Kaufman's and Dr. Amin's views that Mr. Ford was psychotic, but disagreed that he was also incompetent. JA 102-06. Yet the appointed psychiatrists provided no explanation of this—nor did they even note Dr. Kaufman's opinion as to competency—in their reports to the governor. *Id.* Thus, the competing views concerning competency were not communicated to the governor by the appointed psychiatrists.

[6] Indeed where there is no dispute among experts, competency issues—including trial competency and competency to waive appeal—are routinely and appropriately decided by non-adversarial processes. *See, e.g., Gilmore* v. *Utah*, 429 U.S. 1012 (1976), cited by respondent, which approved summary determinations of competency by the state courts where there was no dispute among the experts as to the defendant's competency.

cannot—and never has been held by the Court to—comport with due process.

Such a process of rights-determination is, therefore, not a process that enables even a "neutral and detached" factfinder to find facts reliably. While such a process may be satisfactory in some nations, it is not in ours, for ours is one that, first and foremost, trusts "the adversary process . . . to sort out the reliable from the unreliable evidence and opinion. . . ." *Barefoot* v. *Estelle*, 463 U.S. 880, 901 (1983). By failing to provide for the consideration of the side of the condemned, Florida's 922.07 procedure is at odds with the fundamental requisite of due process of law.

3. Respondent has argued that the determination of Mr. Ford's competency in a federal habeas corpus proceeding "would be wholly inappropriate," because "Ford is not attacking the validity of his judgment and sentence or the lawfulness of the Respondent's custody, since even if there is a right not to be executed while insane, once sanity is restored, the execution can proceed." Brief of Respondent, at 47-48. Respondent's argument is misplaced, however, for it misunderstands the nature of federal habeas corpus.

At bottom, respondent's argument is premised on Mr. Ford's failure to attack his conviction or sentence. To respondent, Mr. Ford's effort to prevent his execution when he is incompetent because of the unconstitutionality of such an execution is not enough of a remedy to seek in federal habeas corpus. Thus, respondent argues that "the traditional function of the writ is to secure *release* from illegal custody," *id.*, at 48 (emphasis in original)—which requires attack upon the conviction or sentence. Habeas corpus has never been so limited.

The jurisdictional basis for the federal writ is 28 U.S.C. § 2241, which authorizes the issuance of the writ whenever any person is in custody in violation of the Constitution of the United States, whether or not the purported authority for that custody is a judgment of conviction and sentence. The 1867 statute which survives today as § 2241(c)(3) and extends federal habeas corpus protection to any person "in custody in violation of the Constitution" was not originally conceived, and never has been conceived, as exclusively—or even principally—providing a means for attacking state-court judgments.[7] It is a procedure for attacking the legality of the petitioner's confinement. It may be maintained when the petitioner is confined under other authority than a judgment of conviction, *e.g.*, *United States* v. *Hamilton*, 3 U.S. (Dall.) 17 (1975); *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 99-100 (1807), and for purposes other than attacking such a judgment, *e.g.*, *Braden* v. *30th Judicial Circuit Court*, 410 U.S. 484 (1973); *Preiser* v. *Rodriguez*, 411 U.S. 475 (1973).[8] Thus, the Court has observed,

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[7] *See generally* Amsterdam, *Criminal Prosecutions Affecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdication to Abort State Court Trial*, 113 U. Pa. L.Rev. 793, 882-89 (1965)/

[8] The irony in Wainwright's position is that historically the writ did not lie at all for the purpose of attacking a judgment of conviction or a sentence. When a respondent's return to the writ showed that the petitioner was held by virtue of a judgment of a court having jurisdiction, the inquiry on habeas corpus ended. *E.g.*, *Ex parte Watkins*, 28 U.S. (3 Pet.) 650 (1830); *Moore* v. *Dempsey*, 261 U.S. 86 (1923). *See generally* Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L.Rev. 441 (1963). The emergence of habeas corpus as a post-conviction remedy available to question the legality of a conviction and sentence is a recent principle resulting from the expansion of the original concept of "lack of jurisdiction." *E.g.*, *Ex parte Lange*, 85 U.S. (18 Wall.) 872 (1873); *Johnson* v. *Zerbst*, 304 U.S. 458 (1938). *See generally Wainwright* v. *Sykes*, 433 U.S. 72, 79 (1977).

> [W]hile our appellate function is concerned only with the judgments or decrees of state courts, the habeas corpus jurisdiction of the lower federal courts is not so confined. The jurisdictional prerequisite is not the judgment of a state court but detention *simpliciter* . . . . [T]he broad power of the federal courts . . . summarily to hear the application and to 'determine the facts, and dispose of the matter as law and justice require,' is hardly characteristic of an appellate jurisdiction. Habeas corpus lies to enforce the right of personal liberty; when that right is denied and a person confined, the federal court has the power to release him . . . .

Fay v. *Noia*, 372 U.S. 391, 430-31 (1963). *Accord Waley* v. *Johnston*, 316 U.S. 101, 104-05 (1942); *Hawk* v. *Olson*, 326 U.S. 271, 274-76 (1945). In *Townsend* v. *Sain*, 372 U.S. 293 (1963) the Court further iterated that the "function on habeas corpus . . . is to test by way of an original civil proceeding, independent of the normal channels of review of criminal judgments, the very gravest of allegations. . . . [T]he power of inquiry on federal habeas corpus is plenary." *Id.* at 311-12.

The question of whether Mr. Ford's claim is appropriately determined in federal habeas corpus therefore does not turn on whether he is attacking his conviction and sentence. It turns solely on whether he is "in custody in violation of the Constitution" within the meaning of § 2241(c)(3) and § 2254(a), if as he asserts, he is being confined for the purpose of executing him and his execution would be unconstitutional. It has long been settled that a habaes petitioner is "in custody in violation of the Constitution" if he is being confined for purposes of subjecting him to *trial* that would violate his federal rights. *See, e.g., In re Loney*, 134 U.S. 372 (1890); *In re Neagle*, 135 U.S. 1 (1890); *Hunter* v. *Wood*, 209 U.S. 205 (1908). There is no conceivable ground, and Wainwright has offered none, for distinguishing the case of a petitioner

held for the purpose of subjecting him to a federally unconstitutional *execution*.[9]

Federal habeas corpus is thus an entirely appropriate vehicle for the determination of Mr. Ford's claims.

CONCLUSION

For these reasons as well as for the reasons advanced in the Brief for Petitioner, petitioner respectfully request that the Court vacate the judgment of the Court of Appeals and remand as requested in his opening brief.

Respectfully submitted,

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[9] *See also Preiser* v. *Rodriguez*, 411 U.S. at 487 (holding that habeas corpus is available to attack future confinement that is unconstitutional).